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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

LAKE-DEARBORN CORPORATION, a corporation,
Plaintiff,

vs.

GILBERT S. ELLITHORPE and **EVELYN ELLITHORPE**,
Defendants.

GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and **LAKE-DEARBORN CORPORATION**,
Third-Party Plaintiffs and Petitioners,

vs.

ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of **FRANTZ AND JOHNSTON**, (R. 55 and 67),
Third-Party Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit.

Honorable Michael L. Igoe, District Judge.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),
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Honorable
Michael L. Igoe,
District Judge.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Judges of the
Supreme Court of the United States:

Gilbert S. Ellithorpe as movant, on behalf of himself and all stockholders as a class and Lake-Dearborn Cor-

poration, Third-Party Plaintiffs and Petitioners, "seeking full remedy for Lake-Dearborn Corporation and its stockholders" (R. 56), pray the issuance of a writ of certiorari to review the decision and judgment of the United States District Court November 19, 1943, and the United States Circuit Court of Appeals for the Seventh Circuit rendered June 5, 1945. (R. .....) That decision and judgment affirmed the dismissal decree by the District Court as entered November 19, 1943 (R. 68), and gave directions for a mandate to the District Court for collection of costs. That mandate was stayed to enable this review. (R. .....) The finding and decree of dismissal by the District Court "with prejudice," (R. 68) had been made in denial of the motion and Third Party Complaint by your petitioners, who assert that only by means of Third Party Complaint can the subject matter and parties be presented properly, for disposition in the District Court of the controversy begun against your Petitioner Ellithorpe by complaint therein filed September 17, 1942. (R. 2ff.)

Statement as to Jurisdiction in Supreme Court.

Neither the District Court nor the Circuit Court of Appeals for the Seventh Circuit filed any opinion with their orders. (R. 68 and .....) The order for dismissal of the appeal was made by the Circuit Court of Appeals June 5, 1945. Mandate was stayed. (R. .....) Timely application for review by this Court is now made within three months. This petition is presented in accordance with Section 240(a) of the Judicial Code as amended, and Rule 38 of this Court as amended. The federal question is the meaning and application of Rule 14 and related rules of Civil Federal Procedure for District Courts.

Your petitioners urge that the Circuit Court of Appeals wrongly refused to reverse the order of dismissal, and the refusal by the District Court to hear third party complaint.

Your petitioners also urge that the order entered in the District Court (R. 68) was final and appealable as a separate order without waiting for completion and entry of decree upon the prior proceedings of that Court.

Federal Question.

Your petitioners state the federal question as follows: Whether the Circuit Court of Appeals may refuse to take jurisdiction of appeal, upon the ground that the denial of the District Court upon the motion for leave to file a Third Party Complaint under Rule 14 of Federal Civil Procedure is not a final and appealable order?

Also whether the addition of words *with prejudice* (R. 68) operate to render such an order final and appealable at once as of right?

Also whether or not in itself, the denial of a motion to file a Third Party Complaint under Rule 14 is a final order and appealable of right at once without completion by trial of matters presented by other pleadings?

"Dismissed With Prejudice."

The colloquy between the District Judge and counsel for Third Party defendants, from the hearing in the District Court reads as follows (R. ....):

> "Mr. Johnston: That is right.
>
> Now, then, if your Honor please, if this question were not so ridiculous, I might become a little bit angry, especially as I happen to be one of the defendants in it. I have never been sued before in a lawsuit, and particularly by anyone that was on the other side of the fence in a lawsuit that I had brought.
>
> I take it your Honor would like an opportunity to read them (handing documents to Court).

The Court: Well, the additional parties defendant are the third parties defendant, and one is a lawyer.

Mr. Johnston: That is all there are; they are all lawyers. Do you wish us to file a complaint—

The Court: (Addressing other counsel) Your motion to file a third-party complaint is overruled.

Mr. Johnston: *Can that be with prejudice,* if your Honor please, *so that this cannot be renewed at a later date?*

The Court: Yes, *with prejudice.*

Mr. Johnston: *Dismissed with prejudice.*

The Court: Yes, sir.

Mr. Johnston: Thank you, your Honor."

The dismissal orders refuse a hearing upon the issue of violation by Third Party defendants, of the Canons of good conduct as lawyers. They continue to act in a dual capacity, using their arguments for the Corporation as a personal defense and shield, to avoid the consequences to them of their own wrongful acts against Ellithorpe and the Corporation. The dismissal orders deny also any hearing upon the question of breach of contract of retainer for which respondents' legal counsel were paid substantial sums of money by Lake-Dearborn Corporation. (R. 56ff, 64ff.)

It is just plain common sense that these lawyers never should have accepted a retainer (if they have one) from the Corporation to pursue this suit against its President and Director (R. 4(5)). Their conduct is particularly open to criticism in view of the fact that they had been employed in May, 1942 as counsel for the Corporation by Ellithorpe acting as President of the Corporation Plaintiff. Appellees by filing and pursuing the original complaint in this suit in the name of the Corporation against Ellithorpe, the President and Director, thereby seeking to remove him from office and from any interest and con-

trol over the affairs of the Corporation, do so merely because he as President, Director and Manager did not entirely accept their advice and directions as counsel for the Lake-Dearborn Corporation.

Petitioners are advised by legal counsel that unless reversal is secured, they will be prevented hereafter from bringing before the District Court in the pending proceedings by any later Third Party Complaint under Rule 14, counsel who may be liable to Lake-Dearborn Corporation, for the damages charged against defendants to original complaint, and petitioners are advised also that they will be bound hereafter because that order against the Third Party Complaint reads "dismissed with prejudice." (R. 68.) Rule 41(b) of Federal Civil procedure.

Summary of Record.

Complaint in District Court was filed September 17, 1942. Answer, Counterclaim and Demand for Jury Trial by Ellithorpe were filed in District Court October 26, 1942. At the same time Mrs. Ellithorpe filed her Answer. At the time this brief is filed in July, 1945, no reply in the District Court has been filed to either Answer and none to the Counterclaim.

The complaint against Ellithorpe (R. 2 ff) ignores the fact that the legal counsel who filed it, on that date sought and obtained new authority to sue over again, all the people which this complaint asserts it was wrongful for the Corporation under the management of Ellithorpe to have sued at a former time. (R. 53.) It ignores the fact and fails to tell the Court that all those former suits were begun by the Corporation under the management of Ellithorpe, only after full consultation and advice with the General Counsel of the Corporation (R. 37) and under the supervision and pursuit of such litigation by eminent and reputable counsel in the City of Chicago. (R. 66.) It

ignores also the fact that those litigations were substantial and well might have resulted in recovery of adequate moneys to solve financial problems of Lake-Dearborn Corporation. (R. 66.) The suit also ignores the fact that those litigations were settled and dismissed in July 1942, only upon the positive and written assurance and recommendation of general and special counsel for the Corporation, that if such settlement were made they would obtain from the ground fee owners a complementary and equal adjustment of their claims against Lake-Dearborn Corporation, which would thereby place the Corporation and the stockholders upon a stable and economic foundation. (R. 41-48.) The suit against Ellithorpe also utterly ignores the fact that General Counsel Osborn and Special Counsel Frantz and Johnston were subsequently employed and paid by Corporation under the aforementioned assurances to consummate the deal with ground owners by September 30, 1942. (R. 50, 64-65.) All these matters in which the counsel for Lake-Dearborn Corporation had taken part, are utterly ignored and hidden from the Court by this complaint against Ellithorpe and wife, which is sworn to by the General Counsel since 1940 who is also a Director for the Corporation (R. 21), and under Rule 11 of Federal Civil Procedure for United States District Courts, is verified as true by all the legal counsel who prepared and signed and filed that complaint.

Upon that complaint which began this suit and before any answer could be interposed, said legal counsel for the Corporation obtained from the United States District Judge, an injunction order, which ties completely the hands of Ellithorpe, as shown by the prayer of that complaint. (R. 56, 19, 20.) While that injunction order is matter for appeal hereafter on review of final decree in main case, if those pleadings hereafter are heard and disposed of by the District Court, yet for all purposes of *this* appeal, that injunction must be accepted as a procedural fact.

Ellithorpe filed his answer and counterclaim October 26, 1942, which are verified by him and thoroughly documented by corporate correspondence and record. (R. 37 to 54.) None of those documents are denied anywhere in this record. No pleading or reply of any kind has been filed at any time to said answer and counterclaim filed and verified by Ellithorpe. Counsel for Lake-Dearborn Corporation did not ever attempt to bring the case to trial, but on the contrary sought continuances.

On September 20, 1943 (R. 65) as reason for a continuance, legal counsel Johnston for Lake-Dearborn Corporation stated to the District Court, that the Corporation was insolvent and would be unable to pay any claim for damages, and therefore it was useless to try any lawsuit. Since Ellithorpe had been then for a year isolated by the injunction from activity and knowledge of the affairs of Lake-Dearborn Corporation, this statement in Court indicated that the $4125.00 cash items which he left with the Treasurer the year before (R. 65) have been dissipated, and indicated that the general and special legal counsel who had filed this suit on September 17, 1942 obtained other fees from that sum in addition to sums in excess of $8,200.00 previously paid them. (R. 64.) Ellithorpe being isolated by the injunction from conferring with anyone else, or acting in any manner other than by defense in this one pending lawsuit, and having been informed in this manner in open Court on September 20, 1943 (R. 65), by legal counsel Johnston for Lake-Dearborn Corporation, that the deal as promised to the Corporation and to both Ellithorpes, had not been consummated by Counsel Osborn and Frantz and Johnston with the ground fee owners, and that the answer and counterclaim would be fruitless, even if successful in obtaining judgment; he sought advice on how to overcome the new difficulty of insolvency and failure created by counsel for Corporation and stated by the said legal counsel for the Corporation. (R. 65.) Being

so isolated by the injunction, Ellithorpe was advised (following statement so made at Court by Johnston September 20, 1943) by the legal counsel who presents this petition, that the only procedure open under the adverse injunction order by the United States District Court, would be the filing and pursuit of a Third Party Complaint, pursuant to Rule 14 of Federal Civil Procedure.

Such a complaint was prepared by counsel and presented by a proper motion filed in writing. (R. 55-67.) The original Third Party Complaint was fully executed, verified and notarized, and was handed up to the Honorable Judge of the United States District Court, at the time of the hearing upon that motion November 17 and November 19, 1943. When the District Court refused to permit the original Third Party Complaint to be filed in his Court, it was handed back to the counsel who presents this petition to this Court, who has it for inspection by this Court, pursuant to the Rules of this Court.

In the District Court, G. S. Ellithorpe, who is one defendant to the complaint filed September 17, 1942, after filing his answer and counterclaim thereto (R. 29 ff), had served notice upon counsel for the plaintiff in original complaint, and presented to the District Court a motion in writing (R. 55) to which copy of proposed Third Party Complaint was attached as an Exhibit. (R. 55 ff.) That motion with Exhibit were filed and entered November 17, 1943. At the hearing on that motion there was argument two days later, and colloquy between the Court and counsel for the plaintiff in the main suit. That colloquy is reported in the record. (R. .....) The District Court entered an order reading as follows:

> "Defendants' Motion for leave to file Third Party Complaint is argued *and dismissed with prejudice.*" (R. 68.)

Thereupon appeal was taken from that order to the Circuit

Court of Appeals, which entered an order dismissing the appeal with costs. (R. .....) This was after printed briefs had been filed and the case heard upon the oral argument. The Court of Appeals presiding Judge stated that there would be no opinion, and that the dismissal would be for want of an appealable order. The order by the Circuit Court of Appeals is a dismissal of the appeal with costs. (R. .....)

That such a dismissal is final and appealable was ruled by *Mutual Reserve Fund Life Ass'n* v. *Smith*, 169 Ill. 264 at 265:

> "* * * The judgment of the appellate court that the appeal be dismissed is a final appealable judgment. A final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely of their rights with reference to the particular suit. It is not at all necessary the judgment should be upon the merits if it definitely puts the case out of court. It is the termination of the particular action which marks the finality of the judgment. A judgment of nonsuit or dismissal is final. 1 Black, Judgm. sec. 21. *Ross* v. *Evans*, 30 Minn. 206, 14 N.W. 897. In *Moore* v. *Williams*, 132 Ill. 591, 24 N.E. 617, the court had before it an appeal from the judgment of the appellate court dismissing the appeal to that court, and fully recognized the judgment of the appellate court as being a final judgment, but dismissed the appeal for the reason the amount involved was less than $1,000. In *Zuckerman* v. *Hawes*, 146 Ill. 59, 34 N.E. 479, this court entertained an appeal from a judgment of the appellate court dismissing an appeal to that court, and reversed the judgment of the appellate court. The motion to dismiss the appeal in this court must be and is overruled."

Corporation Operation by Injunction.

The accepted way for a Court to take control over a business is by receivership or bankruptcy proceedings. In

this case that control was taken by this drastic injunction directed against the President whose powers arose through proxies for a large majority of the stockholders. Shielded by that injunction the control of affairs was taken over in September 1942 by the lawyers who had filed the injunction suit. Since then for nearly three years these lawyers have held no Annual Meetings for the stockholders and made no report to them until April 1945. When the President, so pushed out by the injunction procedure, sought to show the fraud of the suit, by filing a Third Party Complaint on behalf of the Corporation and its stockholders, naming the lawyers as Defendants, the District Court refused to allow it to be filed and heard. This manner of taking and exercising control over a corporation is something new in Court procedure.

Injunction Against Ellithorpe Emphasizes Need for Third-Party Proceedings.

The drastic injunction entered against Ellithorpe by the District Court prevented him from taking any proceeding other than in this case in the District Court; and prevented him from communicating with or asking action by others by any other proceedings or any other Court. There cannot be a situation where need for applying Rule 14 as a mandatory requirement is more complete, than the circumstances which are presented by this record. Even if discretion were permitted by Rule 14, the circumstances call for this Court to duplicate the ruling made in *Corica* v. *Ragen*, 140 F. 2d 496 at 499. The Court there rules that:

> "A court of equity must exercise its discretion in such manner as to safeguard the interests of both parties, and, in certain circumstances, such as those in the instant case, it is an abuse of judicial discretion to issue an injunction which permits one party to obtain an advantage by acting while the hands of the adverse party are tied by the writ."

Rule 14 of Civil Federal Procedure.

On May 3, 1944, the Court of Appeals denied the motion by Third Party defendants to dismiss this appeal, and made reference to the case of *Allen Calculators* v. *National Cash Register Company,* 322 U.S. 137. The appeal there taken was after final decree in that main case (Page 142). The subject matter of that appeal was an intervention under Rule 24. That rule is not pertinent to the case at bar which relates to Rule 14.

One year later on June 5, 1945, the Court of Appeals sustained the renewed motion made by respondents to dismiss the appeal presented by this record. (R. .....)

For a recent discussion of Rule 14, the attention of the Court is directed to *Atlantic Coast Line R. Co.* v. *U. S. Fidelity and Guaranty Co.,* 52 Supp. 177. In that case as in the case at bar, the Third Party Complaint established liability to the plaintiff in the original action. It was ruled that such situation made any amendment of complaint in the original action not necessary. That situation negatives all idea of discretion for filing of Third Party Complaint.

Rule 24 is divided into intervention of right and permissive intervention. Under Rule 13 there is a like division as to permissive and compulsory counterclam. There is no such division in Rule 14. Action under Rule 14 is not stated to be matter for discretion. The provision of Rule 24 and its subject matter are entirely different from the provision of Rule 14 and the case now at bar. That Rule 14 reads as follows:

> "RULE 14. Third-party practice.—(a) When defendant may bring in third party.
>
> "Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plain-

> tiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him."

Action under Rule 14 is not matter for Court discretion. The fundamental difference between the two rule situations is clearly stated by the Supreme Court in the *Allen Calculators* case (322 U.S. 137), at Page 141 as follows:

> "The appellant relies upon *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 665, 661 S. Ct. 666, 85 L. Ed. 975. That case, however, is to be distinguished. There the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken. Such action was taken and, despite the terms of the original decree, intervention was denied. Clearly, as to the intervenor, the action was final. We accordingly entertained the appeal."

At bar by similar manner of fact shown by this record, Ellithorpe and Lake-Dearborn Corporation both will be precluded as parties thereto by the decree in the main case (not yet at issue in District Court).

Reasons for allowance of writ.

Under Rule 41(b) of Federal Procedure, involuntary dismissal operates as an adjudication upon the merits.

> *Maib* v. *Maryland Casualty Company*, 135 Pac. 2d 71, 74; 17 Wash. 2d 47.
>
> *Pulley* v. *Chicago R. I. & P. Ry. Co.*, 251 Pac. 1100, 122 Kan. 269.

An order dismissing on the merits a counterclaim to declare a patent invalid, in an action to recover royalties under the patent, is a final order and hence appealable, even if the plaintiff's claim still remains to be tried. *Jefferson Elec. Co.* v. *Sola Elec. Co.*, (CCA7), 122 F (2d) 124.

A counterclaim for declaratory relief on the facts set forth in the complaint, should not be dismissed on pre-

liminary motion as superfluous but disposition should be deferred until consideration of the case on its merits, since defendant is not necessarily protected against withdrawal of suit and a dismissal of the complaint may not settle all the issues of the case. *Dominion Electrical Mfg. Co.* v. *Edwin L. Wiegand Co.*, (CCA6), 126 F (2d) 172.

A "dismissal with prejudice" is as conclusive of the rights of parties as if suit had been prosecuted to final adjudication adverse to plaintiff. *Bank of America* v. *Jorjorian*, 24 N.E. (2d) 896; 303 Ill. App. 184.

(1) Rule 14 of Federal Civil Procedure, (2) the order of dismissal "with prejudice" and (3) the drastic injunction against Ellithorpe to prevent him from action other than by pleading in the instant case, each separately and all together are unanswerable reasons why this Court should sustain this appeal and should grant Appellants their relief. For each of these reasons the order below is final in fact, and made this prompt appeal unavoidable.

The rule that only completed cases are open for review, requires the correlative rule that parties must be free to present and try cases fully. To read a court discretion into Rule 14 which is not there in words, would enforce upon defendants multiple trials and multiple appeals upon split pleadings about the same subject matter.

(Some italics are used herein for emphasis.)

Prayer for Relief.

Petitioners append hereto their brief and pray the allowance of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to the end that the cause herein may be decided on review by this Court, and that the decree and orders herein by said Circuit Court of Appeals and by the District Court may be reversed, and for such relief as to this Court may seem meet.

WEIGHTSTILL WOODS,
Attorney for Petitioners.